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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 580

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, a Corporation,

Petitioner,

vs.

WILLIAM J. WOODROW,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO GRANTING CERTIORARI

INTRODUCTORY

Respondent will divide his brief in such a way as to make the subdivisions thereof correspond with those of petitioner's brief.

JURISDICTION

Respondent admits that this Court has jurisdiction to grant a Writ of *Certiorari* in this case, but he contends that this case is not a proper one for the exercise of such jurisdiction, and that because that is true, the Court should deny *certiorari.*

QUESTION PRESENTED

Respondent contends, as his statement of the case later will show, that the record does not raise the question stated by petitioner, but on the contrary, that the question which petitioner seeks to raise and which the facts conclusively established by the evidence in fact raise, is:

> Whether it was prejudicial error on the part of the trial court to strike the testimony of three of defendant's witnesses as to the occurence of an accident in which plaintiff's automobile fell off a bridge and plaintiff sustained a scratch on the forehead in getting out of his automobile immediately before it went off the bridge, where plaintiff's action was under the Federal Employers' Liability Act to recover damages for injuries in his lumbosacral region consisting of a ruptured intervertebral disc between the 4th and 5th lumbar vertebrae and disability arising therefrom; where the defendant at the trial contended that plaintiff was not injured in any respect, but notwithstanding such contention, the Court received evidence offered by defendant consisting of the testimony of plaintiff and three of defendant's witnesses to show the occurrence of the bridge accident and that plaintiff sustained a scratch of the forehead as a consequence thereof; where the Court on plaintiff's motion struck from the record the evidence of defendant's three witnesses but did not strike plaintiff's evidence relative to such facts; and where, further, there was no evidence to show any connection between the scratch on the head which plaintiff so sustained and the injuries for which he sought recovery.

STATEMENT OF THE CASE

Generally.

Respondent confesses that he is not sure as to the scope of the statement of the facts which he should make. Certainly, he cannot accept the statement made by petitioner for the reason that many of the statements made by petitioner are entirely unsupported by the evidence. Such statements, together with the comments which petitioner's counsel make concerning them, present an entirely inadequate statement of the facts as the backdrop against which the legal question presented by the petitioner should be viewed.

The Facts as They Relate to the Question Presented.

We have assumed that the petitioner should state accurately and precisely only those facts which raise the question which he presents to the Court by his petition for review. We base this assumption upon the provisions of Rule 38, Subdivision 2 (*U. S. C. A.*, Title 28, Supreme Court Rules, Rule 38, Subdivision 2), which so far as here material, provides:

> "The petition (for certiorari) shall contain a summary and short statement * * * of the questions presented * * * Only the questions specifically brought forward by the Petition for Writ of Certiorari will be considered. * * *"

This Court has repeatedly held that review by certiorari will be confined to the question stated in the petition as the one presented to the Court for review.

National Licorice Co. v. National Labor Relations Board, 309 U. S. 350 (Note 2, p. 357), 60 S. Ct. 569, 84 L. Ed. 799.

Flournoy v. Wiener, 321 U. S. 253, 259, 64 S. Ct. 548, 88 L. Ed. 708, 321 U. S. 754. Rehearing denied.

Steele v. Drummond, 275 U. S. 199, 48 S. Ct. 53, 72 L. Ed. 238.

In the light of that rule, we think that an adequate statement of the facts would be those set forth in the opinion of the Court below (R. 647-658). Summarized, these facts briefly are that while plaintiff was employed by defendant as an engineer, he sustained on November 12, 1949, as the consequence of operating a defective grate shaker bar, lumbosacral injuries consisting of a ruptured intervertebral disc between the 4th and 5th lumbar vertebrae and disability arising therefrom (R. 27, f. 3; R. 28, ff. 1-3; R. 30, f. 1; R. 32; R. 33; R. 100); that these injuries totally disabled plaintiff from doing any kind of work (R. 71-73); that the bridge accident set forth in the question above occurred, as petitioner states, two years and eleven days after the accident in which he sustained the bodily injuries as defendant's employee; that plaintiff did not claim any head injuries as a consequence of defendant's negligence on November 12, 1949 (R. 1-7); that the only injury sustained by plaintiff as a consequence of the bridge accident was a scratch on the forehead (R. 108) and that there was no connection shown between the scratch on the forehead sustained as a consequence of the bridge accident and the lumbosacral injuries sustained as a consequence of defendant's negligence on November 12th, 1949 (R. 482; R. 483; R. 658).

While defendant claimed that plaintiff was not injured at all at the time of trial and was able to resume his work as a railroad engineer, it nevertheless offered evidence to show the occurrence of the bridge accident consisting of the testimony of plaintiff (R. 107-113) and of its witnesses, Kemp, Young and Lippincott (R. 455-484). There was no motion to strike the testimony of plaintiff concerning the bridge accident. Plaintiff, however, moved to strike the testimony of Kemp, Young and Lippincott concerning the bridge accident (R. 481-482); and the trial court struck the evidence of these three witnesses (R. 482-483). The trial judge, who is now a

Justice of the Supreme Court of Minnesota and one of its most distinguished citizens, stated as the reason for so striking the testimony of Kemp, Young and Lippincott (R. 483):

> "The reason I have permitted the testimony is to show whether, in fact, he was injured, there was any injury that amounted to testimony as an injury that affected the person of the plaintiff. I see no testimony here unless it is followed up by something additional upon which any fact could be predicated as to injury received of any consequence, therefore the Court must grant the motion."

During the cross examination of plaintiff to elicit testimony concerning the bridge accident, plaintiff's counsel objected to such testimony on the grounds that there was no foundation for it, and the Court indicated at that time that some further foundation would have to be established (R. 108-109), and during the examination of Witness Young, plaintiff's counsel indicated that he would have no objection to such testimony if it were shown that the injuries sustained in the bridge accident "aggravated" plaintiff's then condition (R. 457).

Notwithstanding these warnings, defendant offered no evidence to show any connection between the bridge accident injuries and the injuries on which plaintiff based recovery. This, in spite of the fact that plaintiff was examined by defendant's regular physician, Dr. Yoerg, as peitioner states, about two months after the bridge accident and about five days before the trial.

Statement of Facts to Clarify the Statement Made By Petitioner.

Petitioner has made so many statements of facts which are entirely unsupported by the evidence and has so colored and slanted other facts that we deem it appropriate to set forth all the facts in order that the Court may have the true factual picture of the case. This statement shall consist of a chronological statement of the evidence question with summaries of such important facts as we deem necessary to present a true and factual statement of the case.

Chronological Statement of the Evidence.

Plaintiff, a resident of Ottumwa, Iowa, born on July 28, 1899 (R. 12, ff. 1, 2) brought this action against defendant to recover for injuries alleged to have been sustained by him on November 12, 1949 (R. 3, f. 1), while employed by defendant as a locomotive engineer, and while operating engine No. 480, while hauling about 70 cars from Laredo, Missouri, to Ottumwa, Iowa (R. 3, ff. 1, 2; R. 21, f. 3).

Plaintiff reported to work November 12, 1949, at 5:25 A. M. the day on which he was injured, at the west yard at Ottumwa, Iowa, where he was to be an engineer on a freight train going to Laredo, Missouri, a distance of 103 miles, with Robert J. Boyd as his fireman (R. 15, ff. 1, 2, 3).

Plaintiff's train left Ottumwa about 6:10 A. M. with 10 "loads" (loaded cars) and 16 empty cars pulled by an L-2 type, stoker-fired, coal-burning engine No. 480 (R. 16, ff. 1, 2, 3).

This was a steam engine with the fire box approximately six feet wide and nine feet long located under the boiler; the sides of the fire box being the boiler water-ledge, the front the flue sheet where the flues are fastened on, and the bottom consists of four sections of grates, each section operated independent of each other, and there are four lugs, two on the engineer's side, and two on the fireman's side, which are used

to operate these grates, and that is done by a shaker bar on them (R. 17, ff. 1, 2). The shaker bar is about 4½ feet long and the lugs are about six or eight inches high (R. 19, f. 3); the shaker bar has a housing that fits down securely over the lug which is tapered and if they are in good condition there is no play in them, and many times it is necessary to tap them with a coal pick to take the bar off the lug (R. 20, ff. 1, 2).

On leaving Ottumwa with 26 cars and the caboose the engine carried 200 pounds of steam, the normal amount for engine No. 480; no trouble was encountered with the engine on the trip to Laredo, Missouri, as the train was light and short (R. 20, f. 3; R. 21, f. 1).

The engine was cleaned by the roundhouse force at Laredo and the return trip from Laredo to Ottumwa was started around 4:30 P. M. with the same engine No. 480 hauling about 70 cars, some being loads and some empties with the steam gauge of the engine showing 200 pounds of steam (R. 21, ff. 2, 3; R. 22, f. 1).

The first stop was made at Osgood, Missouri, 13.6 miles from Laredo; the next stop was at Newton, Missouri, 13 miles from Osgood, and the third stop was at Powersville, Missouri, 39 and some tenths miles from Laredo (R. 22, ff. 1, 2, 3). Immediately after leaving Laredo the engine started lagging steam and a mile from Laredo the steam was back to 180 pounds and, on arrival at Osgood, was down to 140 pounds, whereas the normal amount of steam for this engine hauling 70 cars should be 200 pounds at all times because with 140 pounds the engine won't handle the train, can't make speed and the brakes would start to drag and some of the brakes would start to set (R. 22, f. 3; R. 24, ff. 1, 2, 3).

On arrival at Osgood, plaintiff, observing this condition, instructed the fireman to clean the fire; the locomotive fire box is cleaned by opening the grates and knocking out the

clinkers and when the clinkers are removed the grates are straightened back up, the coal shoved ahead, then you have practically a new fire. This operation took about 45 minutes. The reduction in the amount of steam from 200 to 140 pounds was caused by the engine not steaming because the flues were leaking, the super heating units were leaking (R. 23, f. 3; R. 24, ff. 1, 2).

After the fireman cleaned the fire at Osgood the train started for Newton with 180-185 pounds of steam; on reaching Newton it was down to 130 pounds and the fire was dirty and clinkered and plaintiff again instructed the fireman to clean the fire at Newton. If the engine was in proper working condition it wouldn't be necessary to clean the fire or move the grates on the trip from Laredo, Missouri, to Ottumwa, Iowa (R. 24, f. 3; R. 25, ff. 1, 2).

After the fireman cleaned the fire at Newton, the train continued on to Powersville, arriving about seven-forty-fifty and pulled in on the passing track with the engine headed east, to let a passenger extra by, at which time the steam was down to 130 pounds and the fireman said he was tired as it was hard work cleaning the fire at intervals like he was doing. Plaintiff told the fireman to go to the ground and clean the ash pans beneath the engine and that plaintiff would clean the fire (R. 25, f. 3; R. 26, ff. 1, 2, 3; R. 27, ff. 1, 2; R. 146, ff. 1, 2).

Plaintiff cleaned the fire by putting the shaker bar down on both of the lugs, first on the engineer's side, opening and closing the grates, then moved to the fireman's side and cleaned one grate, having then one more to clean on the fireman's side. While he was cleaning the last one and had the grates open with the shaker bar pointing west, and if the grates are in proper condition they work freely and can be operated with one hand by moving back and forth toward and away from the boiler head which in this instance would

be east and west (R. 27, f. 3; R. 28, ff. 1, 2, 3).

Plaintiff placed the shaker bar on the lug in the regular and usual manner as far as it would go; there was slack in it and a looseness evidently from wear; it was supposed to fit tight but it was loose enough so you could jiggle it. With that section of the grate open, plaintiff knocked all the clinkers out, shoved the live coal to the front section and everything was removed from that section and the next job was to close the grate (R. 28, f. 3; R. 29, ff. 1, 2, 3).

Plaintiff then attempted to pull the shaker bar to close the grates and facing west with his hands on the top part of the bar, his feet spread on the deck of the engine to brace himself, he pulled back on the shaker bar. The rod that connects the grate lug to the grate, which is a part of the boiler, wasn't free, it was caught and there was a spring in it. Plaintiff took hold atop the bar, got all the slack he could by pushing it in forward motion and pulled back with all his strength and as he did so, it came loose with a sudden, violent, unexpected motion, the shaker bar came off and he was thrown against the boilerhead hitting the lower part of his back (R. 30, ff. 1, 2, 3; R. 31, ff. 1, 2, 3).

The shaker bar should not come off if in proper working condition, but the rod of the grate rigging was sprung and if in proper working condition the grate should close easily, based on plaintiff's experience in operating grates thousands of times over a period of 32 or 33 years (R. 32, ff. 1, 2, 3). That plaintiff, when speaking of the connecting rod being twisted or bent, was speaking from observation of years of experience cleaning fires and shaking grates; that he could tell when one of those rods are sprung when he pulled back on it; it was not just his opinion, he knew that is what happened (R. 100, ff. 1, 2, 3).

Plaintiff, while he was attempting to clean the fire, was able to see and determine the cause of lack of steam; he

could see water running down off the flue sheet in and out of the ash pan. In his opinion that was the reason the steam was being reduced, and the reason the fire had to be cleaned on the different occasions on the trip from Laredo to Ottumwa (R. 33, ff. 1, 2, 3).

At Powersville, plaintiff informed the dispatcher of the situation and the 70 cars were taken out of the train at Powersville and the engine and caboose proceeded to Ottumwa (R. 148, f. 1). The reason for setting out the train was the poor condition of this engine (R. 164, f. 2).

Fireman Boyd did not think the engine was steaming good enroute from Ottumwa to Laredo (R. 140, f. 3); the roundhouse men cleaned the fire at Laredo as that is a terminal, however, on the return trip the occasion for stopping at Osgood was to clean the fire, as it was all clinkered, and they didn't have steam and had to "blow up for steam," that is, get the steam built up, so it would not necessitate setting out the train. Again at Newton a stop was made to blow up for steam and Boyd had to clean the fire again as the fire was just a solid clinker (R. 142, ff. 2, 3; R. 143, ff. 1, 2, 3). On leaving Newton, plaintiff took the place of fireman Boyd and fired the engine to Powersville to see if he could get it hot, and he didn't have any better luck than Boyd, the fireman (R. 144, ff. 2, 3). When Boyd looked at the fire at Powersville it was pretty well blue, clinkered heavy fire and had to be cleaned if the engine was going to do anything. Boyd was "pretty well poohed out" doubling back, cleaning fire (R. 146, ff. 1, 2, 3). At Powersville he filled the boiler full of water and put coal in with a scoop shovel to help keep it from clinkering; had the blower on and got the engine hot. Boyd went to eat and returned 20 minutes later (R. 147, ff. 1, 2, 3). He found the water level had gone down as the engine was leaking and the fire was cleaned again. Plaintiff cleaned the fire and Boyd the ash pans, and while doing so,

plaintiff hollered to Boyd who came up in the cab and found plaintiff all bent over the seat with the shaker bar in his hand and he had the fire door open. One section of the grates didn't have coal over it and the rest of the fire was low. Boyd lined up the grates and started building up the fire (R. 148, f. 2; R. 149, ff. 1, 2, 3; R. 150, ff. 1, 2). The engine was then hooked onto the caboose and started for Ottumwa and Boyd had more trouble after that keeping steam up than he did when they had the train of 70 cars (R. 148, f. 3); that engine 480 had a plugged fire box; that it was leaking (R. 151, ff. 2, 3; R. 152, f. 1); that it was unusual to clean the fire box three times (R. 153, f. 1); that if the shaker bar is in position it should not come loose (R. 155, ff. 1, 2).

Carl A. Simpson, a retired engineer, formerly employed by defendant for 33 years, operated engine No. 480 out of Laredo on October 14, 1949 (R. 167, f. 3; R. 168, ff. 1, 2, 3; R. 169, f. 3), and on December 10, 1949, and again on December 15, 1949, and the engine was "leaking, bad flues" (R. 170, ff. 1, 2, 3; R. 171, f. 3), he had trouble for steam, engine leaking every time he had it (R. 172, f. 3), the flues were leaking and the grates would lock (R. 173, f. 3), they would be solid and you just didn't move them, and there was only one way to move them, and that was to knock the fire all out for that section of the grates and clean it and then get it back; that the leaks form a honeycomb or scale over the flue sheet and stops air passage and stops the heat and kills the draft; that his fireman had trouble with the grates; it took both Simpson and his fireman to work one particular section of the grates, and that they should not lock if in proper working order (R. 174, ff. 1, 2, 3; R. 175, ff. 1, 2); that after a shaker bar has been fitted over a grate lug and while shaking a fire, it should not come off the lug; that they will wear from constant use (R. 176, ff. 2, 3; R. 177, f. 2).

J. G. Story, a locomotive fireman employed by defendant

since December 11, 1926, who had fired hundreds of engines (R. 184, f. 3; R. 185, ff. 1, 2, 3), testified that he worked on engine No. 480 on November 5, 1949, when the engine steamed hard and they had to clean the fire; the grates were sticking and hard to break loose and he told engineer Dobratz to report the grates on the engine (R. 187, ff. 1, 2, 3).

Frank Chrisman, in the employ of defendant since 1941 as a locomotive engineer (R. 197, ff. 2, 3), testified that in October and November of 1949, he operated engine No. 480 (R. 198, ff. 2, 3). He identified Plaintiff's Exhibits 7, 8, 9, 10, as engine inspection reports prepared by him on engine No. 480 at the end of runs on which he had operated the engine. Exhibit 7 being dated October 21, 1949; Exhibit 8, October 28, 1949; Exhibit 9, November 27, 1949, and Exhibit 10, December 1, 1949 (R. 199, ff. 2, 3; R. 200, ff. 1, 2). Exhibit 7 reported: "Clean fire box and flues. Examine for leaks. Water running out of pan. Raise up shaker rods, they lay down on pan." They connect grates with shaker lever lug. "Left front sand pipe loose in joint above wheel. Square valves, engine lame."

Exhibit 8 reported: "Square valves, engine very lame. Rods and boxes pounding bad. Take lost motion out of reverse gear. Tighten left top guide bolts. Tighten nuts of left front binder bolts."

Exhibit 9 reported: "Clean fire box and flues and examine for leaking, engine steams very poor." "Mud ring leaking, right side." "Left top inside guide bolts broken. Piece broken out of cross head shoe. Set up left main wedge." "Packing nuts on pump pistons leaking. Oil air end of pump."

Exhibit 10 reported: "Clean fire box and flues and test out for leaks. Engine steams very poor. Fire cleaned twice this trip. Packing nuts on pump leaking." These reports were all in the handwriting of Chrisman and reported his experiences with engine No. 480 on the dates specified (R.

202, ff. 2, 3; R. 203, ff. 1, 2, 3; R. 204, ff. 1, 2).

William E. Woodrow, Jr., a witness for plaintiff, testified that he was employed by defendant as an engineer and that he had worked for over four years as a traveling fireman (R. 522 f. 3; R. 523, ff. 1, 2, 3); that it was his duty to supervise fireman and instruct in the proper way to operate the shaker bar and grates on engines of the L-2 class, the type of engine No. 480 (R. 525, ff. 1, 2, 3); that the shaker bar operates towards the boiler head and opens the grates wide, also back toward the tender and open the grates, the distance depending upon the condition of the grate rigging and the engine deck; that the grates can be opened by operating the shaker bar toward the tender but not as much (R. 259, f. 1); that the ordinary practice is to shake it back and forth, move it to the limit both ways (R. 530, ff. 2, 3; R. 551, f. 2); that when the grates don't move freely or catch in a certain position the general cause is a bent rod (R. 533, f. 2); that the place a bent rod will be caught on is between the fire box and the top of the ash pan (R. 543, f. 2).

Defendant's witness, J. L. Brosserd, denied that the grates could be opened by moving the shaker bar to the forward position (R. 253, ff. 1, 2). Generally they could not, but there are some engines with grate rods not of proper dimension, they might tip back and forward some (R. 432, f. 3).

Frank B. Corr, a traveling engineer employed for defendant (R. 440, ff. 1, 2), testified a forward movement of the shaker bar opened the grates, and a backward movement closed them (R. 446, ff. 1, 2, 3); that if the shaker bar and grates are in proper condition they should operate easily; that the grates can be opened some in the backward position and if you want to close them you wiggle them back and forth (R. 450, ff. 1, 2, 3; R. 451, f. 1).

Monty L. Kemp, a police officer of the Milwaukee road, testified he saw plaintiff on the evening of November 23, 1951,

in a cafe at Ottumwa, Iowa (R. 455, ff. 1, 2, 3); that he appeared mussed up (R. 460, f. 3); that Kemp left the cafe and drove to the Black Hawk River Bridge over the Des Moines River where there were police officers and a Plymouth sedan upside down below the bridge (R. 463, ff. 1, 2, 3), and damage to the bridge (R. 464, ff. 1, 2, 3; R. 465, ff. 1, 2, 3). This witness did not testify to seeing plaintiff at the scene or that he had been in the automobile.

Warren J. Young, a police officer for the City of Ottumwa, Iowa, testified as did Kemp that he was at the scene of an automobile accident at the Black Hawk Bridge (R. 470, f. 3; R. 471, ff. 1, 2, 3); that he found plaintiff's name in the car; that he searched for plaintiff but did not find him (R. 475, ff. 1, 2, 3; R. 476, ff. 2, 3).

John Lippincott, Deputy Sheriff of Wappello County, Iowa, testified that he went to plaintiff's home November 24 to serve a paper; that plaintiff had a small bandage on his forehead, an inch or two (R. 477, ff. 2, 3; R. 478, ff. 1, 2, 3); that he was not feeling well enough to go to town (R. 479, f. 3).

On motion of plaintiff the testimony of Kemp, Young and Lippincott was stricken for the reason that there was no testimony that plaintiff had sustained any injury in the accident (R. 481, f. 3; R. 482, f. 3; R. 483, f. 1).

Howard T. McLaughlin, employed by defendant in the claim department for 32 years, saw plaintiff June 6, 1951, and that plaintiff told him how the accident of November 12, 1949, occurred (R. 484, f. 1; R. 485, ff. 1, 2, 3); that McLaughlin prepared a statement, but plaintiff did not sign it (R. 492, ff. 1, 2).

Harold J. Barry, employed by defendant as District Adjuster since 1944 (R. 494, ff. 2, 3), testified regarding the absence of Dr. Nelson at the trial (R. 496, f. 2).

Plaintiff lives on Rural Route 4, Ottumwa, Iowa, on Rock

Bluff Road, and coming from town crosses Black Hawk Bridge where he had an accident November 23, 1951, when his car skidded and crashed into the bridge railing. Plaintiff opened the door and got out of the car (R. 106, f. 3; R. 107, ff. 1, 2, 3). Plaintiff received no injuries except a scratch on his forehead.

Summary of Evidence as to Defects in Grates.

There was testimony that the grate rods were too low and close to the ash pan (R. 206); that the rods should have been raised (R. 202); that where, as here, the rods become "red hot," they bend easier (R. 543); that the rod on the grate being shaken by plaintiff was bent and sprung (R. 30, 31, 32); that an experienced operator of the shaker could tell that the rod was bent and caught by the spring thereof (R. 30-31; R. 533); that the grates on this engine stuck (R. 187); that one section of these grates would lock (R. 173) or get stuck (R. 30).

Plaintiff testified that the effect of the rods getting caught was a sort of recoil or spring action. He testified:

> "A. When I pulled on the shaker bar it had compressed this grate rod enough to free it up and it let go with all this force, acted as a spring." (R. 121.)

The witness, William Woodrow, Jr., testified:

> "Q. And you can't tell from seeing it whether it is or not bent?
>
> "A. You could certainly tell from seeing it if you saw it.
>
> "Q. I say, from the cab you can't see it, therefore you can't see whether it is or is not bent?
>
> "A. May I answer that?
>
> "Q. I would like to have you answer my question.
>
> "A. The only way I can answer that is in this way: When you are working and the grates don't move freely or catch in a certain position, the general cause of that is a bent grate rod, and the feeling of a bent grate rod is

different than it would be if there was something ahead, like between the grates; does that answer your question, sir?" (R. 535.)

"A. Well, the reason I said that it is often quite possible with a bent rod to move it back and forth, but if the rod is put in an extreme position, or in one position, oftentime it catches and when you pull on that rod, there is give to it a lot of times is what I meant by being able to feel; it isn't like you were pulling against a stone wall, there is just a little bit of spring; you have all done that, felt that, when you get a hold of something—" (R. 535.)

Grates and rods in good repair and condition operate freely without getting stuck (R. 32; R. 174-175; R. 527).

The witnesses on this point were plaintiff, Carl A. Simpson, and plaintiff's son who was a traveling fireman for defendant and whose duties were to instruct others in the use of shakers and grates. All had had extensive experience, working about locomotives in the defendant's shop, and were competent to testify as to these matters and had worked on engine No. 480, the one involved here (R. 11-13; R. 167-176; R. 522-525).

Defendant's only evidence to the contrary was the testimony of defendant's witness, Brossard, who had no knowledge of engine No. 480 and also certain shop records.

Summary of Evidence as to Defects in Shaker Bar.

Shaker bars become worn from use and vibration of the locomotive (R. 178); from use as an all-around tool (R. 527-528); and because that is true are likely to come off while being used (R. 538-540). Mr. Woodrow, Jr., testified:

"A. Yes, the shaker bar is one of the handiest pieces of equipment on the engine. It is used to straighten out switch points. There are gratings on the deck, if you have some trouble, a lot of times they don't fit properly, and they pound against it to get those down; it is used

to pry side rods or main rods; whenever it takes something heavy for a pry, it is used for that purpose." (R. 528.)

"A. A lot of times this lug, it is hard to get it back into locking position from either direction, so they take the body of this shaker bar and they beat against it; the reason for that is rather simple. This bar weighs, I would say, between 15 and 20 pounds, and if it is four or five feet long, you try to stand with one hand and work that and get your lock in position, it is rather hard to do, and a lot of times they will take those shaker bars and pry it or beat on it into a locking position, and a lot of times when these shaker bars fit tight, get way down on your lug, you have to take something pretty heavy and beat it in order to get it loose, and in that process, a lot of our shaker bars are cracked, and are brazed, so it will be because this is beaten up and the shaker bar won't fit properly, or because this is too big.

"Q. If you do have a crack in the housing that makes an additional surface to catch, doesn't it, because it fits over tightly?

"A. You will have to go a little farther.

"Q. If you are going to make it loose enough to come off, you have got to be able to get it—if you are going to get it loose enough so it will come off, you have got to be able to go right down into the grate lug which is parallel, is that right, so that you have got a big enough opening, otherwise, if you have got enough of an opening so it will catch on the slanting portion of the grate lug, it is hard to bring it off, whenever you push it down and place it properly, isn't that right?

"A. Yes, sir, when it slips off it is because most of the time, because it won't fit clear down onto the lug like it should.

"Q. Because it won't go all the way down on the lug?

"A. Yes, sir." (R. 538-540.)

Engine No. 480 had been in service for about 30 years (R. 246-247).

Defendant's witness Brosserd testified that "there wouldn't be a possibility of a shaker bar slipping off" the grate lug

(R. 237); but he also testified only from his knowledge of the class of engines to which locomotive No. 480 belonged, and not from personal knowledge of that locomotive (R. 255).

The testimony also was that, if the shaker bar and the grate lug were in good condition and repair, the shaker would not come off by operating the grates by means thereof (R. 32; R. 526-527); but do come off if the lug itself is worn or the shaker bar is damaged (R. 527).

It is undisputed that this particular shaker bar was so loose that it could be jiggled by mere handling it (R. 29).

Summary of Evidence as to Whether Shaker Bar Can Be Pulled Backward Toward the Tender.

Plaintiff's version as to the happening of the accident was that he pulled the shaker bar back toward the tender then pulled it toward the boiler, and that while pulling it toward the boiler, it sprung so as to throw him with great force against the boiler (R. 30-31). Defendant contended that the accident could not have happened in that manner for the reason that the shaker bar could not be pulled back toward the tender and that the farthest back it would go was in a perpendicular position (R. 257-258).

The testimony that the grates could be opened by pulling the shaker bar consisted of that of plaintiff (R. 30-31) and that of William Woodrow, Jr., who testified:

> "Q. Assuming the grates were in good condition, perfect condition the way you have described, you say, in the backward motion you could open the grates one inch; how far could you open the grates in the forward motion toward the boiler?
>
> "A. I don't know in exactly inches, but it will open enough that the grates will tip at an angle about like this; it would depend on how wide the grates are.
>
> "Q. They will fully open, and I take it what you described will be something like a foot. I'm not tying you down to inches, that is about your opinion, isn't it?

"Mr. Rerat: Let him give his opinion.
"A. No, I would say eight inches, ten inches.
"Q. What?
"A. Eight to ten inches.
"Q. Anyway, it is to the full opening?
"A. Yes, sir." (R. 546.)

While Mr. Brosserd denied that the grates could be so opened by a pull of the shaker bar toward the tender, he also testified:

"Q. Material or not material, I want to get your testimony so we don't misunderstand each other. Your testimony here is that by a backward position toward the tender that the grates can't be opened or manipulated with the shaker bar in that direction, is that it?

"A. That would depend on how the locking device, how the deck of the engine is, where the shaker staff comes through.

"Q. And if they do open in that direction does that mean that there is something wrong with the mechanics of that particular part of the boiler?

"A. Well, it would hinder the full opening forward the way they were intended to be.

"Q. Does that mean there is something defective, then, about that particular apparatus?

"A. I wouldn't call it defective. I wouldn't call it a desirable condition." (R. 433.)

Summary of the Testimony Relating to Plaintiff's Injuries.

Plaintiff himself testified that he was thrown against the boiler with a "very hard impact" (R. 32); that he suffered great pain therefrom (R. 33) in the small of the back, hips and legs (R. 34); that he endured such pain on the return trip all the way back to Ottumwa (R. 34); that, when he got back to Ottumwa he told the roundhouse foreman about his injury and got from him an order to go to the company's doctor, Dr. Nelson, of Ottumwa (R. 35); that he then went home, where his wife took care of him and put hot packs on his back and where he had a night of pain, sleeplessness—

a hard, restless night (R. 35); that the next day (November 13, 1949) he went to Dr. Nelson, the company's doctor (R. 35), who gave him hypodermic shots and taped his back, and told him to use hot packs at home and he would be all right and able to go back to work (R. 36); and that thereafter his wife applied hot packs, but he took no medicine (R. 36).

From November 13, 1949, to December 23, 1949, he worked "as best he could." During this time he went to Dr. Nelson every few days, took the pills prescribed for him by the doctor (R. 36) and continued to have his wife put on the hot packs (R. 37); but he was never free of pain in the back and pains in the legs, which were "terrific" (R. 37). On December 23, 1949, he took his regular run as an engineer from Ottumwa to Laredo. His condition became acute while he was at Laredo and as a consequence he was unable to operate the engine back to Ottumwa. Instead he rode back as a passenger—in railroad parlance he deadheaded back (R. 38). As to his condition at that time he testified:

> "A. I was in such intense pain I couldn't sit down, I couldn't stand up, I tried to stand up and I tried on my knees, and it was necessary for me to lay off when I arrived at Laredo and deadhead home on the passenger."

Upon plaintiff's return to Ottumwa, he again consulted Dr. Nelson, who in the period between December 24, 1949, and January 18, 1950, made arrangements to send plaintiff to Dr. Metz, in Chicago, defendant's head surgeon, for treatment in Wesley Memorial Hospital in that city, where he remained for 30 days (R. 38-39). While in the hospital his back pained him at all times and he was given massage and pills and had a rectum operation (R. 38-41).

Plaintiff returned home in February, 1950, and continued to consult Dr. Nelson. He worked as an engineer from February 28, 1950, to August 28, 1950. During this time he suffered intense pain in his back and legs, walked with difficulty, con-

tinued his consultations with Dr. Nelson and his hot pack treatments at home. He slept on a board as directed by Dr. Metz of Chicago. After work he went to bed (R. 40-41). In April, 1950, Dr. Nelson called in Dr. Fox of Ottumwa, who fitted plaintiff with a heavy brace (R. 41). On August 28, 1950, Dr. Nelson again called in Dr. Fox and they had plaintiff put in a hospital in Ottumwa for about a week. While there, he was put in traction, given electric diathermy and treatment for skin sores caused by the brace (R. 40-44).

After leaving the hospital in Ottumwa in September, 1950, plaintiff was again sent to Dr. Metz in Chicago (defendant's head surgeon) who treated him again at Wesley Memorial Hospital in Chicago by means of massage, medication and sedatives every day. That was the last time he was in a hospital (R. 44-46). He was there for 57 days (R. 215).

After plaintiff left the hospital in December, 1950, he was continuously under Dr. Nelson's care until a few days before the trial in March, 1952. During 1951, Dr. Nelson called in, besides Dr. Fox, a Dr. Eberle E. Thornton, an orthopedist of Des Moines, Iowa, who fitted plaintiff with another, but a lighter body brace for which defendant's claim agent, Harold J. Barry, paid (R. 46-47). During all the time from the date of the injury, November 12, 1949, to the time of trial, plaintiff suffered terrible pain and loss of sleep, which he described in his testimony, as follows:

> "A. Well, the pain in the small of my back feels just like you were sticking an ice pick in it, and it runs down my leg, and that is also from laying, and when I twist or turn, I couldn't tell you—it is just like you were getting stabbed in the back; unexpected shock, like riding an engine, just the normal operation of the engine, every time you hit a little joint or high joint or flat spot on one of the wheels, it hits you in the back like somebody sticking a knife in you." (R. 48.)
>
> "A. I don't sleep well. If I have any activity, then this pain gets my back. I lay down in bed and relax,

maybe after a couple of hours I can go to sleep, but the first time I turn around, bang, I am awake again; every time you move, it is there." (R. 49.)

Prior to his injury, plaintiff had been in good health and had not been involved in any railroad accident (R. 49). After the accident plaintiff lost 45 pounds in weight—his weight decreased from 205 to 160 pounds.

Plaintiff's wife testified that plaintiff had been in good health prior to his injury (R. 217) and slept well (R. 216); that she "cried" when plaintiff came home during the night of November 12, 1949, after his injury because he looked so "terrible" (R. 213); that she found his back swollen and sore at that time (R. 213); that she administered hot packs and heat treatments (R. 214); that plaintiff was attended by Dr. Nelson, was in the Ottumwa Hospital 20 days (R. 215); worked from February to August, 1950; that he went to see Dr. Nelson during that time and had home treatments (R. 215); that he was in the Chicago hospital for 57 days (R. 215); and that he suffered intense pain and could not sleep. She testified:

"Q. What has been the situation since he was injured on November 12, 1949?

A. Well, I used to have a hard time waking him up. Now I pray for him so he can sleep; he can't sleep."

and that he lost 45 pounds in weight.

Dr. Arthur E. Bratrud testified on behalf of plaintiff that he, the doctor, graduated in 1912 from the University of Minnesota College of Medicine (R. 51); that he served an internship at Ancker Hospital in St. Paul, Minnesota (R. 52); that he did post-graduate work at Johns Hopkins (R. 52); that he was of the Department of Peripheral Nerve Surgery in the Reconstruction Hospital; that he was on the staffs of Asbury and Mt. Sinai Hospitals and free to practice in others in Minneapolis (R. 52-53); that he was a member of

numerous medical societies—naming them (R. 53); and that he is and had been an assistant professor in surgery at the University of Minnesota. He personally examined plaintiff, studied his medical history, including his prior medical treatment and the records of the Ottumwa Hospital and X-rays which he had taken (R. 54-60). His examination showed plaintiff had muscle spasm in the lumbo-sacral region which

> "* * * indicates that it is—there is some deeper injury there below the skin, deep in the muscle or ligaments; the ligaments surround the bony structure, and spasm is nothing more than an effort of nature to hold those areas at rest so as to give them relief." (R. 60.)

He also found that there had been a narrowing of the space between the 4th and 5th vertebrae, the significance of which was:

> "It usually means that there is an injury or a rupture; I mentioned about this fluid inside of the middle of this cartilage; it usually means that there is a rupture of it with destruction of it, and the vertebrae become more collapsed, begin to draw more closely together." (R. 63.)
>
> "Now, if you compare these vertebrae here, it looks as though there might have been a compression injury, that is a flattening out of the anterior portion of this vertebrae, of the body. You can see the distance, the width of this vertebrae as compared to this one, there is quite a difference on the anterior margin. And here again, in the lower part of the spine, if you compare the distance between the two vertebrae in this area, it appears as though there is a lessening in this inter-vertebral space, 4 and 5." (R. 64.)

He also described plaintiff's condition as:

> "A. Well, I think primarily he has a prolapsed or injured disc.
>
> Q. Which one, Doctor, would you say?
>
> A. Lumbar 4 to 5, and I think he has had an aggravation of his arthritic condition, and he probably had a

great deal of tearing of the ligaments around the lumbar sacral junction, and there is apparently some irritation of the nerves leading to both lower extremities.

Q. I am sorry but I am trying to get everything you stated; you mentioned the nerve?

A. There is some irritation or injury to the nerves leading to the lower extremities." (R. 67.)

These injuries affected plaintiff's back and legs. He also testified that as a consequence of such, injuries were permanent (R. 69); that such injuries permanently disabled plaintiff from doing his work as a railroad engineer, the kind of work he had done for 27 years (R. 71-72); and that such injuries and disability were caused by the accident plaintiff was in on November 12, 1949 (R. 73).

Ottumwa Hospital Records. These showed that plaintiff had been treated in the hospital by Dr. Nelson and Dr. Fox and that Dr. Fox diagnosed his case as one of "retropulsed disc" with pains in the back and legs (R. 212; R. 318).

The admission diagnosis of plaintiff's case when he was received at Ottumwa Hospital was that he had a "retropulsed disc with unstable lumbo- sacral joint." (R. 308).

Wesley Memorial Hospital Records. When plaintiff was received at this hospital, X-rays were taken of his lumbosacral region by a Dr. Barth, which were made part of the hospital record. Dr. Barth noted thereon (R. 303):

> "A. The vertebral bodies and interspaces are of normal height, except for a narrowed interspace between the fourth lumbar vertebra and the adjacent transitional type fifth lumbar vertebra."

The X-rays which Dr. Barth found which he stated showed a narrowing between the fourth and fifth vertebrae were identified by Dr. Householder at page 304 of the record.

The medical testimony on behalf of defendant consisted of the testimony of three doctors, none of whom had treated

plaintiff professionally. Plaintiff had been attended by at least five doctors employed by defendant, viz.:

Dr. Nelson of Ottumwa
Dr. Fox of Ottumwa
Dr. Thornton of Des Moines
Dr. Metz of Chicago
Dr. Householder of Chicago

He was examined by these five doctors and also by two others, Dr. Conley of Chicago and Dr. Yoerg of Minneapolis.

Only Drs. Householder, Conley and Yoerg testified as witnesses. Dr. Yoerg was the only doctor who produced his notes of the examination made by him. Dr. Householder and Dr. Conley did not produce their notes.

Dr. Householder testified that he graduated in medicine in 1922 and commenced to practice in 1923 (R. 260); that he was a member of numerous medical societies (R. 261); that he had been assistant surgeon of defendant since 1927 and became chief surgeon 34 days before he testified at the trial (R. 260-261); that on January 18, 1950, he examined plaintiff as to his injuries and condition and found that he had pains in sacroiliac region of the back on both the right and left sides, over both buttocks and down into the legs (R. 263); that he had an abscess in the rectum (R. 266). He stated that plaintiff claimed that he had been hurt shaking grates (of an engine) with a shaker bar (R. 264); but that plaintiff had said nothing about having been thrown against the boiler (R. 265), nor about the shaker bar coming loose (R. 265). He did not testify as to whether he inquired about the last mentioned matters. He also testified that X-rays were taken of plaintiff's lower back and that the X-rays showed no evidence of injury between the fourth and fifth vertebrae (R. 270-272) or of "unusual narrowing of the intervertebral space between those vertebrae" (R. 273).

Again on September 26, 1950, plaintiff was re-admitted to the hospital (R. 275). Dr. Metz determined whether he should be so re-admitted (R. 277). The re-admission was made because of plaintiff's complaints of back injuries (R. 277-278). X-rays again were taken (R. 278), which showed no changes (R. 279). He further testified that he had examined Dr. Bratrud's X-ray films and that they showed no evidence of fracture, dislocation or injury in the fourth-fifth vertebrae region (R. 284-286).

He testified that in his opinion plaintiff had received "no injury" on November 12, 1949, and that plaintiff's pain and soreness are associated with degenerative changes (R. 287-288).

On cross examination he testified that he did not have his notes with him (R. 290); that he refreshed his recollection before the trial by "looking" at the hospital record (R. 291); that he could not say whether Dr. Nelson of Ottumwa had sent plaintiff to Chicago to be treated for back injuries for the reason that he had not examined the correspondence with respect to the matter before the trial and did not have the correspondence with him (R. 292); that he found that plaintiff had muscle spasm in lumbo-sacral region of the back (R. 293), but that the X-rays didn't show any intervertebral injuries (R. 299). He further testified that Dr. Metz was in Chicago and not present at the trial (R. 294), and that plaintiff was hospitalized at Dr. Metz's suggestion (R. 295-296). He also testified that X-rays will show bone structure and injuries, but not injuries to the muscles and ligaments (R. 299). He testified that some of the symptoms and factors involved in an intervertebral injury such as plaintiff claimed to have were pain in the back (R. 301), muscle spasm (R. 300), narrowing of the intervertebral spaces (R. 302). He found no such narrowing (R. 303). He admitted that the Ottumwa Hospital record showed that Dr. Nelson and Dr.

Fox diagnosed plaintiff's injury as "retropulsed disc" between the fourth and fifth vertebrae (R. 317) and that the Wesley Memorial Hospital record made by Dr. Barth, who took X-rays there, showed a narrowing of the intervertebral space between the fourth and fifth vertebrae (R. 303-304). He refrained from explaining the significance of "insecurity in the lumbosacral joint" found by Dr. Fox (R. 314).

He gave it as his opinion that, if plaintiff had all the evidences of injury to the disc in the intervertebral space between the fourth and fifth vertebrae claimed by him, plaintiff had the injuries which he claimed and that the traction treatment administered (at the Ottumwa Hospital) was a recognized treatment for the relief thereof (R. 318-319); but that he was of the opinion that plaintiff had no such injury (R. 322).

Dr. Conley testified that he had never treated plaintiff (R. 348), but that he had examined plaintiff in his office in Chicago (R. 331); that plaintiff complained of pains in sacroiliac region or lower back (R. 332-334); that X-rays were taken for him by a Dr. Cannon (R. 342-343); that what an X-ray will disclose depends upon the position of the light tubes and the manner of reading the X-ray film (R. 337-340); that, if Dr. Cannon's were read one way, they disclosed a narrowing between the fourth and fifth vertebral and if read in a different way, they did not do so. His testimony was:

> "A. *Well, if you call this the fourth and call this the fifth, that is normal, there is no narrowing. If you call this the fourth and this the fifth, there appears to be some narrowing because the X-ray is right over this area and not centered over this one.* It is not taken—the direct ray is centered right here, and this point in another film is not entirely straight here. If this happened to have been taken from the other side—you are dealing with bodies with thickness—taken from the other side, then it would appear wider. We can see on

> the front of you that there is no narrowing between the fourth and fifth. This is Defendant's Exhibit X. Now, in this particular film, depending upon if we call this the fifth and this the fourth, there is quite a wide space here. *If we call this the fourth and this the fifth, the space above does not appear quite as wide as it does below but if you take a film of this type, between the fourth and fifth, there is quite a wide space here*—this is the center, is exactly over this particular film and this is Defendant's Exhibit Y; this is taken to throw out quite broader, to include the sacroiliac joints. If you look at a side view of a large area of these intervertebral spaces, they are all the same and seem to be quite well open, there is no particular narrowing." (R. 338, f. 3; R. 339, ff. 1, 2.)

He gave it as his opinion that there was no evidence that plaintiff had intervertebral injury between the fourth and fifth vertebrae (R. 346); that plaintiff was not injured, and that he could go back to work (R. 348).

On cross examination the doctor stated that, while he had notes, he did not have them with him (R. 349); that it was not necessary to do so (R. 349-350); that he had brought along his X-rays and his memory and that "I carefully reviewed my record before I came here, and that is the proper (this word later was stricken) procedure" (R. 350); that (contrary to what Dr. Householder said) traction is not a recognized procedure for treating disc injuries, but may be used for back injuries (R. 352-353); that he looked for muscle spasm (R. 354-355), but found none (R. 357). He stated that narrowing of the intervertebral spaces, pain in back extending down into legs, and muscle spasm are all factors to be considered in determining the existence of an intervertebral disc injury (R. 354-355; R. 362-364). He concluded by stating that "I firmly believe" that I know more about plaintiff's condition as a consequence of his own examination, which took about one-half hour (R. 348), than Dr.

Nelson did as a consequence of attending and treating plaintiff for over two years (R. 364).

Dr. Yoerg testified with the aid of his notes and stated:

> "I then inquired as to what he was in the office for, what it was about. He told me that he had injured his back in an accident on November 12, 1949, about 7:30 in the evening, at Powersville, Missouri, said he was helping fireman clean fire, shaking grate, and he had to give it a hard pull, it suddenly let go and he wrenched his back, the shaker bar then came off, he said he was thrown against the boiler head."

The rest of his notes is a resumé of most of the case history (R. 370-372). He testified that on Exhibit AA the space between the fourth and fifth vertebrae appeared "narrower" (R. 373), but that all depends on how the picture was taken and how it is read (R. 373-374). He found muscle spasm, but nothing abnormal except back pains (R. 376). His conclusion was that at the time of trial plaintiff could not do the work of a railroad engineer, but would be able to do so in a month to six weeks, if he would quit wearing his brace and have some manipulation (R. 378-379).

On cross examination he testified that he did not treat plaintiff professionally and saw him only for about 45 minutes (R. 390); that the treatment given by Dr. Nelson and Dr. Fox could be proper for a disc case (R. 391), but that he found no disc injury at the time of trial (R. 396); that the records of Wesley Memorial Hospital show a finding of narrowing of the intervertebral space between the fourth and fifth vertebrae (R. 397-398); that pain in lumbo-sacral region radiating down into the legs and muscle spasm are evidences of such intervertebral injury (R. 398).

He testified also that Dr. Bratrud and Dr. Barth saw in their X-ray films a narrowing between the fourth and fifth vertebrae (R. 400, 401) but that he was able to determine

a stereopticon made by a Dr. Lyons that there was no such narrowing (R. 407). The stereopticon was not produced in court and no demonstration thereof given.

Summary of Evidence Relative to Damages.

Plaintiff's own testimony already stated above was to the effect that he had a partial physical disability from November 12, 1949, to August, 1950; that thereafter until the time of trial he was totally disabled; and that he suffered severe and acute pain both day and night so that he was uncomfortable and suffered during the daytime and was unable to sleep at night (R. 48-50). His wife's testimony was to the same effect. She was an eye-witness to his suffering and in desperation and hope prayed that the man she could not awaken when he was well might be blessed with sleep as relief from his agony (R. 213-216). Dr. Bratrud testified unqualifiedly that plaintiff was permanently and totally disabled from working as a railroad engineer (R. 71-73).

Plaintiff's life expectancy was 19.49 years at time of trial (R. 211-212).

His average earnings per month as an engineer were (R. 84):

1950	$474.32	(during time he worked)
1949	432.20	
1948	245.31	
1946	322.00	

CALCULATION OF RESPONDENT'S DAMAGES

As shown in the statement of facts just made, plaintiff's loss of earnings, past and prospective, exceeded the verdict as reduced by the trial court by at least $54,000.00. This amount consists of the following:

Loss of earnings from February, 1950, to March, 1952, 19 months at 474.32	$ 9,002.08
Loss of wages during his expectancy of 19.49 years at an average of 450.00 per month	105,246.00
Total	$114,248.08

This does not include any allowance for pain and suffering. We think that the jury would have been justified in awarding plaintiff somewhere between $35,000.00 and $70,000.00 as an additional allowance for such damages.

ARGUMENT

I.

Where Later Injuries Are to a Different Part of the Body and Are Not Shown to Have Any Connection With the Injuries on Which Plaintiff Bases His Cause of Action, Evidence Concerning the Later Injuries Should Be Excluded.

City of Birmingham v. Carlson, 209 Ala. 428, 96 So. 333.
Hall v. Shenandoah, 167 Iowa 735, 149 N. W. 831.
Johnson v. City of Troy (N. Y.), 124 App. Div. 29.
Rhyner v. City of Menasha, 107 Wis. 201, 83 N. W. 303.

In the case of *Birmingham v. Carlson, supra*, plaintiff sustained a sprain of the left ankle due to stepping into a depression in a street and later sustained an injury to the right ankle. The Court excluded the evidence of injury to the right ankle upon the ground that there was no testimony to show any connection between the two injuries. The Alabama Court said (96 So. 335):

"Dr. Anthony, testifying as a witness for plaintiff, described plaintiff's injury, a sprain of the left ankle, and his treatment thereof. On cross examination, after the court had overruled plaintiff's objection to evidence of trouble with the 'other ankle,' this witness described a trouble on the outer side of plaintiff's right ankle, which he saw and treated about six weeks after the injury in question. He described the trouble on the outer side of the right ankle as being probably a thrombus or clot, in a vein which was relieved as soon as the vein was opened and allowed to bleed a little. He said that this trouble had nothing whatever to do with the injury to the left ankle, and said further, in effect, that it did not affect the right ankle, meaning, as we suppose, and as the jury may have inferred, that it did not affect the use or strength of the left ankle. Then on plaintiff's motion this evidence as to plaintiff's right ankle was excluded. There was in this no error, though plaintiff did not repeat the objection which had been overruled. *Not only did the testimony of the witness show that this later trouble had nothing to do with the accident, but, if defendant would have had the jury find a weakness of the right ankle which may have contributed to plaintiff's injury, the evidence related to a time too remote, and, if not too remote in point of time, the fact furnished no excuses for the condition of the street.*" (Emphasis supplied.)

In the case of *Johnson v. City of Troy, supra,* the pertinent facts appear from the following quotation of the Court (R. 30-31):

"While the plaintiff's counsel assured the Court when the evidence objected to was received *that he would connect it,* and while it was shown that the plaintiff received an injury to the groin or to the right side of his abdomen and that there was contusion and inflammation there which the physician who attended and operated upon him testified he was reasonably certain was due to the accident, there was a complete failure of proof to show that the appendicitis for which the plaintiff was operated upon was necessarily and directly caused by the injuries which the plaintiff received." (Emphasis supplied.)

In the case of *Rhyner v. City of Menasha, supra,* the Wisconsin Court said (107 Wis. 210-211, 83 N. W. 307):

> "Plaintiff's accident happened in November, 1891. Dr. Oviatt was permitted to testify that he performed an operation on plaintiff's leg in the summer of 1893, for which he charged $100. The record contains no testimony showing *any necessary or causal connection* between the injury and the subsequent operation. Unless so connected, the evidence was improper." (Emphasis supplied.)

These authorities are pursuasive that the evidence relative to the bridge accident was very properly stricken from the record by the learned trial judge. In view of the fact, as above set forth, that defendant claimed throughout that plaintiff was not injured at all and that he was able to resume his work as a locomotive engineer and of the further fact that Dr. Yoerg claimed the plaintiff's only trouble was arthritis from which he would recover in a month or two, it seems to us that petitioner has taken an inconsistent position which should preclude it from even asserting the contention which it now makes. On the one hand it claims that plaintiff was not injured and on the other it claims that he was injured solely as the result of the bridge accident. But its claim that plaintiff was not injured extends according to its evidence even to the injuries sustained in the bridge accident for the reason that Dr. Yoerg who examined plaintiff after the bridge accident testified that plaintiff was not injured at all.

At any rate, it is clear that under the authorities the evidence concerning the scratch on the forehead which plaintiff sustained in the bridge accident had no connection with the lumbo-sacral injuries which plaintiff sustained in the railroad accident.

In this connection, it is important to bear in mind that the Witness Kemp testified that he didn't know anything about the bridge accident or how it happened (R. 468); that

plaintiff's Plymouth sedan was found upside down under the bridge (R. 464); that he saw plaintiff in the Milwaukee Cafe in Ottumwa within a few minutes after the accident and that plaintiff was then moving around in said place (R. 456-458). The Witness Young simply testified to the fact that plaintiff's automobile was found upside down under the bridge and that part of the bridge railing had been knocked down (R. 473-76). Testimony of the Witness Lippincott was that on the day after the accident, plaintiff had a small bandage on his forehead and that plaintiff stated that he did not feel well enough to go to town (R. 478-480). In short, none of these witnesses testified that plaintiff was in the car when it went over the bridge, much less that plaintiff had sustained any injuries as a consequence thereof. Plaintiff's statement that he was not well enough to go to town on the day following the accident was not shown to relate to any disability caused by the bridge accident, and therefore, under the authorities cited, was not admissible.

Plaintiff's own version was that the bridge accident occurred because of the slippery and icy condition of the road that night; that the car skidded; that the skidding knocked out part of the railing on the west side of the bridge; that plaintiff got out of the car just before it went off the bridge. At that time plaintiff was sober (R. 107-112). Plaintiff's testimony, in part, is:

> "Q. All right, you tell us what happened.
>
> "A. On this particular date I was going home, and it was a very rough approach onto this bridge, and the bridge was covered with ice; I was only driving five or six miles an hour slowed down with the brake, and the car started to skid, and it crashed into the railing on the right side, and it bumped along there a little, and I opened the door and got out—the car practically came to a stop—I opened the door and got out of the car, and the car did turn over and fall off the bridge. I was never into the left hand rail or any place; it just kind

of skidded sideways; it was a wooden guard rail, by the way, knocking that off, and the car skidded—it was only going a mile or two an hour, a mile I would say—I opened the door, got out, and the car turned over.

"Q. You got out of the car and let the car go off the bridge and fall down 12 or 15 feet down below, and turn upside down?

"A. The car went off five or six feet, I guess, something like that.

"Q. It is 12 or 15 feet down there?

"A. Regardless of what it is, the car went over the bridge.

"Q. Did you have any injuries?

"A. *Absolutely not, except a scratch on my forehead. I had a scratch on my forehead as I got out, I bumped the door and had a scratch on my forehead.*" (R. 107-108.) (Emphasis supplied.)

Plaintiff's testimony that he did not sustain any injuries in the bridge accident except the scratch on his forehead was absolutely uncontradicted and undisputed.

It is respectfully submitted that the trial court simply followed the well-established rules of evidence in striking the testimony of Kemp, Young and Lippincott because it was not shown; first, that plaintiff had sustained any injuries as the result of the bridge accident, except the scratch on the forehead; and secondly, because it was not shown that the scratch on the forehead had anything to do with the injuries for which plaintiff sought recovery against the defendant.

II.

Striking Testimony Is Not Prejudicial Where the Facts to Which the Testimony Relates Is Otherwise Established.

It is the rule of this Court, and also of the State Courts, that exclusion of evidence is not prejudicial where the facts to which the excluded evidence relates is otherwise established by other evidence.

Matheson v. United States, 227 U. S. 540, 57 L. Ed. 631, 33 S. Ct. 355.

Drumm-Flato Commission Co. v. Edmisson, 208 U. S. 534, 52 L. Ed. 606, 28 S. Ct. 367.

Lucas v. Brooks, 18 Wall. (U. S.) 436, 21 L. Ed. 779.

Cannon v. Pratt, 99 U. S. 619, 25 L. Ed. 446.

Schmitt v. Emery, 211 Minn. 547, 2 N. W. 2d 413, 139 A. L. R. 1242.

Metalak v. Rasmussen, 184 Minn. 260, 238 N. W. 478.

5 *C. J. S., Appeal and Error,* Sec. 1749.

In the *Matheson* case, this Court said (227 U. S. 543) that:

> "The exclusion of testimony as to facts subsequently proved"

presents no ground for reversal.

While it is true that the testimony of Kemp, Young and Lippincott relating to the bridge accident was stricken, there was neither a motion to strike nor an order striking the testimony of plaintiff, himself, who stated the facts relative to the bridge accident more fully and adequately than did defendant's witnesses. Thus, after the order striking the testimony of Kemp, Young and Lippincott relating to the bridge accident, all the facts to which their testimony related appeared from the testimony of the plaintiff, which was not stricken. Defendant had the full benefit of this testimony of plaintiff for the consideration of the jury. Thus, the facts to which the testimony of Kemp, Young and Lippincott re-

lated remained for the consideration of the jury because of the testimony of plaintiff. The exclusion of the testimony of the three witnesses named certainly was not prejudicial for the reasons stated.

CONCLUSION

The Petition for Certiorari raises no substantial question for consideration of this Court. We not only approve the rules laid down by this Court in the cases cited by petitioner, viz.:

Bailey v. Central Vermont Ry., Inc., 319 U. S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444 (1943).

Carter v. Atlanta & St. Andrews Bay Ry. Co., 338 U. S. 430, 70 S. Ct. 226, 94 L. Ed. 236 (1949).

Dice v. Akron, Canton & Youngstown R. Co., 342 U. S. 359, 72 S. Ct. 312, 96 L. Ed. 398 (1952).

Lavender v. Kurn, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916 (1946).

M. St. P. & S. S. M. Ry. Co. v. Moquin, 283 U. S. 520, 51 S. Ct. 501, 75 L. Ed. 1243 (1931).

Tennant v. Peoria & P. U. Ry. Co., 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520 (1944).

Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, 63 S. Ct. 444, 87 L. Ed. 610 (1943).

Wilkerson v. McCarthy, 336 U. S. 53, 69 S. Ct. 413, 93 L. Ed. 497 (1949);

but we also think that the rule of these cases should be extended so as to encompass every case where the evidence presents any issue of fact. We think that the instant case does not come within the rule of those cases for the reason there was no evidentiary connection shown between the injuries sustained by plaintiff as the result of defendant's negligence and the head-scratch injury sustained by him as a consequence of the bridge accident.

We therefore respectfully submit that the Court should deny the Petition for Certiorari.

Respectfully submitted,

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Attorneys for Respondent.

MAY 31 1954

In The

Supreme Court of the United States

OCTOBER TERM, 1953

No. 350

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, a Corporation,

Petitioner,

vs.

WILLIAM J. WOODROW,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 580

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, a Corporation,

Petitioner,

vs.

WILLIAM J. WOODROW,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

INTRODUCTION

Respondent has not only avoided but has concealed and confused the question presented herein. Accordingly a brief reply is deemed appropriate to clarify the single question presented and to correct the wholly inadequate and misleading analysis of the problem urged upon the Court by respondent.

THE QUESTION PRESENTED

At the outset of respondent's brief under the heading "Question Presented" is a long, involved question based upon inaccurate and presumed facts and having little or no real significance herein. One broad question of law is presented to the Court by the petition—whether the Minnesota Supreme Court has ignored the strict and repeated pronouncements of this Court in reference to the litigant's right to trial by jury of disputed questions of fact in actions under the Federal Employers' Liability Act. Under that Act material questions of fact are matters for determination by the jury and not the Court.

The exercise of the Court's discretion is sought not only because it is believed that the decision below is erroneous but also upon the broader ground that an important question of Federal law is presented; that the principle involved herein, namely, the right of a *defendant* (and not only a plaintiff) to trial by jury under the Federal Employers' Liability Act, is unique and of far-reaching national significance in the adjudication of the rights and liabilities created by the Federal Employers' Liability Act. The petition is further based upon the ground that the decision of the Minnesota Supreme Court herein is irreconcilably opposed to the applicable decisions of this Court.

Respondent has in no sense challenged this foundation of the petition *nor has he attempted to distinguish the present case from the numerous decisions of this Court in which certiorari has been granted to review the failure of a state court to recognize the right to a jury determination of all material questions of fact in actions under the Federal Employers' Liability Act.* In this sense respondent has ignored the broad question of law presented herein.

The specific question presented by the evidence is whether the claimed permanent back injury complained of by plain-

tiff at the time of trial was *caused, contributed to, or aggravated by* an automobile accident at the Black Hawk Bridge more than two years after plaintiff's alleged railroad accident. It is petitioner's sole contention that this is a question of fact for the exclusive determination of the jury and not one for the trial court.

It, of course, is not necessary for defendant to show that plaintiff's condition of injury at the time of trial was solely the result of the Black Hawk Bridge accident, but it is sufficient if the testimony raises the inference that his disability is in any part the result of said bridge accident. Defendant should not be required to respond in damages in any amount whatsoever for the injuries received by plaintiff in such bridge accident. The lower court took this question of fact away from the jury.

RESPONDENT'S STATEMENT OF FACTS

Thirty-one pages of respondent's 38-page answering brief are devoted to a discussion of selected portions of the evidence. Part of respondent's statement is repetitious of that made by petitioner while respondent has discussed other facts at length which are not material to the question presented. Certain other statements are not only misleading but wholly inaccurate. Those portions of the evidence detrimental to respondent's case have been carefully avoided.

We do not say there was no evidence on which the verdict for plaintiff was based, but we do say there was substantial material evidence withdrawn by the Court from the consideration of the jury upon which the jury properly could have found plaintiff's disability at the time of the trial was wholly or partially proximately caused by the bridge accident.

In addition to other unsupported accusations contained in respondent's brief, petitioner is accused of having gone be-

yond the scope of the question presented in discussing the evidence relating to plaintiff's claimed shaker bar accident. It is not petitioner's intention to raise an additional question by presenting these facts but only to show the legal inconsistency between the holding below in reference to the question of the alleged shaker bar accident and the holding below on the question of the bridge accident.

It is the decision of the lower court that it is for the *jury* to determine whether the shaker bar accident occurred as claimed by plaintiff and whether the disabilities found by plaintiff's doctor at the time of trial were caused by said shaker bar accident. On the other hand, the lower court held that it is for the *Court* to say whether the bridge accident occurred as claimed by *defendant* and whether the disabilities found by plaintiff's doctor at the time of trial were caused or contributed to by the bridge accident. This gross inconsistency is one of law and can only be shown by relating the facts surrounding plaintiff's doubtful shaker bar accident. For instance, in the shaker bar accident, the Court, without any direct evidence at all, let the jury infer from circumstances set out by plaintiff that the grate rods, below the deck of engine, and out of sight of plaintiff (R. 99, 100), may have been bent, causing the accident.

On the other hand, in the bridge accident where plaintiff's car knocked out 10 feet of railing on the left side of the bridge and then crossed to the right side of the bridge and knocked down 60 or 70 feet of substantial posts and railings, the Court in substance held as a matter of law that the car was going two miles an hour as testified to by plaintiff. Certainly from these facts the jury would be justified in holding the car was going not at two miles per hour but at a very rapid rate of speed and that plaintiff must have fallen off the bridge with his car and, of course, sustained a tremendous jolt or concussion to his person.

Defendant's Exhibits "E", "F" and "G" are pictures of the Black Hawk Bridge after it had been repaired. These are included in the appendix, *infra*. The pictures graphically show the heavy construction of the bridge rail and the distance from the bridge to the ground.

A further comparison of the evidence in relation to the two accidents is of significance in that it reveals that the likelihood of injury from the bridge accident is far greater than the possibility of injury in the rather insignificant shaker bar accident. Had the issue of the bridge accident been submitted to the jury, it would have been of significance that plaintiff failed to report his alleged railroad accident and the allegedly defective condition of the grate shaking equipment to the conductor and members of his train crew (R. 219-221); that plaintiff failed to report the engine defect on his engine condition report made at the end of his train's run (R. 97-99; Exhibit "C"); that plaintiff explained to Dr. Householder in January, 1950, how the accident occurred and made no reference to the shaker bar having come loose nor to his having been thrown against the boiler head (R. 264, 265); that in June, 1950, plaintiff again described the accident to Witness McLaughlin and affirmatively stated that there was nothing defective about the shaker bar and that the shaker bar did not come loose (R. 485, 486, 492, 493); and that the physical construction of the grate shaking apparatus was such that plaintiff, as shown by his own son and by certain defendant witnesses, could not have sustained injury in the manner described by him at the time of trial (R. 547, 548, 232, 240, 441, 446). Of additional importance is the fact that on March 9, 1950, plaintiff wrote a letter to defendant stating that he had "recovered" from his recent injury (R. 105). This letter, Defendant's Exhibit "D", is reproduced in the appendix, *infra*.

Respondent has commented on the fact that defendant called only two of the six doctors who either examined or treated plaintiff before the bridge accident. Dr. Householder was called not only because of his high professional qualifications but because he was in a better position to know plaintiff's physical condition following his alleged railroad accident than any of the other doctors who attended him, having treated plaintiff constantly during his two periods of hospitalization from January 18, 1950, to February 10, 1950 (R. 267), and from September 26, 1950, to December, 1950 (R. 275, 295). Respondent's statement at page 24 of his brief that none of the doctors called by defendant had ever treated plaintiff professionally is, therefore, shown by the record to be false.

Dr. Conley is one of the most distinguished and outstanding orthopedic surgeons in the United States and the head of the Orthopedic Surgery Department of the Cook County Hospital, the largest hospital under one roof in the country (R. 329). Dr. Conley was called because it was felt that by virtue of his professional experience and standing he was better qualified to objectively ascertain and describe plaintiff's back condition than any of the other doctors who had treated or examined plaintiff after his claimed railroad accident.

Dr. Yoerg was called because he had examined plaintiff after the *bridge* accident and was familiar with plaintiff's condition at that time.

Certainly no inference unfavorable to defendant may be drawn from the fact that *defendant* did not also call Doctors Nelson, Fox, Thornton or Metz as *additional* medical witnesses to testify to plaintiff's condition between the time of the alleged railroad accident and the time of the bridge accident. Such additional testimony would have been merely cumulative of that of Doctors Householder and Conley.

It is also important that none of these doctors were residents of Minnesota. Plaintiff's case having been imported into the Minnesota courts from Iowa, the defendant was powerless to compel the attendance of witnesses residing outside the state who did not wish to voluntarily testify. Likewise the Minnesota court did not have jurisdiction to subpoena their presence. The record is clear that defendant, without success, exerted every possible effort to have Dr. Nelson's office records brought to the trial as soon as it developed they were material (R. 496). The record further shows that at the time of trial Dr. Nelson was in Arkansas on vacation (R. 496).

The record is also clear that pre-trial depositions of numerous witnesses were taken by plaintiff and at plaintiff's instance in Ottumwa, Iowa (R. 9, 10); that defendant was given notice of plaintiff's intention to take the deposition of Dr. Nelson of Ottumwa at the same time (R. 497-501); and that at the last minute plaintiff's attorney changed his mind and decided not to take Dr. Nelson's deposition, even though Dr. Nelson was present in Ottumwa and available at the time as were the attorneys for both parties (R. 501). Plaintiff could also have taken the depositions of Doctors Fox and Thornton at the same time.

Notice was also given of plaintiff's intention to take the deposition of Dr. Metz, and the Record Librarian of Wesley Memorial Hospital on January 18, 1952, at Chicago, Illinois (R. 10). While the Record Librarian's deposition was so taken in Chicago with attorneys for both sides in attendance (Ex. 5), plaintiff again changed his mind and refrained from taking Dr. Metz's deposition although there was ample opportunity for plaintiff to do so.

It is therefore clear from the evidence that if Doctors Nelson, Fox, Thornton or Metz could have given the slightest testimony to support plaintiff's claim of back injury follow-

ing his alleged railroad accident, *plaintiff* would have obtained that testimony. *Plaintiff obviously could find no doctor familiar with plaintiff's condition between the time of the alleged railroad accident and the time of the bridge accident who would testify that plaintiff had any back injury or disability resulting from the claimed railroad accident.* Apparently the only doctor plaintiff produced who would testify that plaintiff had objective symptoms or back injury was Dr. Bratrud, *whose examination and testimony was based entirely on plaintiff's condition several months after the bridge accident.* If there is any unfavorable inference to be drawn from the failure to produce the testimony of Doctors Nelson, Fox, Thornton and Metz, the inference is unfavorable to plaintiff and not defendant.

It Is for the Jury to Determine Whether Plaintiff Sustained Back Injury or Aggravation in the Bridge Accident.

Respondent argues with great vigor that where there is subsequent injury to a different part of the body from that upon which plaintiff's cause of action is based, evidence concerning the subsequent injury is not admissible. This may be the law but it has no application whatsoever to the present case. *Respondent's entire argument is based upon the fallacy that the only injury sustained by plaintiff in the bridge accident is a "head scratch."* In other words, respondent has assumed, as a matter of law, a fact which is the crux of the issue presented. For this reason, his argument is not only meaningless, but frivolous.

In support of his argument, respondent has taken an isolated segment of the evidence consisting of plaintiff's own version of the bridge accident and plaintiff's own version of the "head scratch" injuries he claims to have sustained therein and has argued this evidence in the light most favorable to plaintiff. The conclusion respondent has reached by this

type of legal reasoning is not surprising. It is so well settled as to obviate citation of authority that in determining whether there is sufficient basis to submit an issue of fact to the jury, *all the relevant evidence as well as the inferences to be reasonably drawn therefrom must be examined in the light most favorable to the party asserting the issue.* Here the defendant is the party asserting the issue before the Court. Respondent refuses to examine the evidence in the light favorable to defendant since to do so is fatal to his position. If all the evidence is examined, as well as the reasonable inferences, in the light most favorable to defendant, the evidentiary basis for a jury issue becomes clear. Aside from the compelling circumstances surrounding the happening of the bridge accident itself, the pertinent medical testimony is either overlooked or misstated by respondent, since it, too, condemns his position.

Nothing can explain away the testimony of Dr. Bratrud, plaintiff's only medical witness, who testified that AFTER the bridge accident plaintiff had a prolapsed intervertebral disc (R. 67), and who further testified that plaintiff had a long-existing arthritic condition of the back which had been aggravated (R. 63, 65, 73, 74), and who further testified that any trauma will always *aggravate* such arthritic condition and will always cause pain (R. 66). Dr. Bratrud did not know plaintiff's condition before the bridge accident and could not testify as to whether the back injury which he found was a result of the bridge accident 3½ months before his examination or whether it was a result of the alleged railroad accident 27 months before he had seen plaintiff. If the jury could not infer a connection between the back injury described by Dr. Bratrud and the bridge accident, then it could not infer a connection between the said injury and the railroad accident, which was far more remote in point of time than was the bridge accident. The point ignored by

respondent is that the injury his own doctor found could have been caused by either accident, or both. The likelihood is that the condition found by Dr. Bratrud was caused wholly or at least in part in the bridge accident. But whatever the answer to this question is, it is a question of fact within the exclusive province of the jury.

Respondent has also accused petitioner of now taking an inconsistent position, because it is stated that defendant contended at the time of trial that plaintiff was not injured in any respect. For example, see Respondent's Brief, page 2, where it is stated, "* * * Where the defendant at the trial contended that plaintiff was not injured in any respect," and also see Respondent's Brief, at page 33, to the same effect. The record shows respondent's statements to be untrue. Dr. Yoerg, defendant's witness, who, like Dr. Bratrud, had not examined plaintiff until *after* the bridge accident, agreed with Dr. Bratrud that plaintiff was not in shape to resume work at that time due to his back condition (R. 378). Dr. Yoerg further testified that after the bridge accident plaintiff had muscle spasm in his back (R. 375) and a limitation of motion (R. 387), and that the muscle spasm is an indication of an abnormal back condition and may indicate serious back injury (R. 389). He also testified that a fall or concussion, such as plaintiff must have experienced in the bridge accident, would aggravate a degenerative arthritic condition of the back such as plaintiff was suffering from, and that even stooping down to pick up something might aggravate it (R. 410).

The reasonable inference to be drawn from the medical testimony itself is that the disability found by Dr. Bratrud and Dr. Yoerg was caused by the bridge accident. This is especially true in view of the testimony of Doctors Householder and Conley, who did not examine plaintiff after the bridge accident but who did treat and examine plaintiff fol-

lowing his alleged railroad injury. In the opinion of both Doctors Householder and Conley, plaintiff had absolutely no objective evidence of back injury after the railroad accident and before the bridge accident. (Dr. Householder: R. 270-273, 275, 284, 285; Dr. Conley: R. 340, 341, 342, 346). Plaintiff's subjective complaints of back pain at that time, which did not relate to the back of the spine (R. 263) nor to the area of the fourth or fifth vertebra (R. 282) were ascribed to plaintiff's degenerative arthritic condition (R. 269, 271, 273) and to an acute rectal abscess which was disabling and required immediate surgery (R. 266, 267).

In addition to the medical testimony, other aspects of the evidence connect plaintiff's condition at the time of trial with the bridge accident. For example, plaintiff suffered a substantial loss of weight at about the time of the bridge accident (R. 115). His weight remained constant for sixteen months after his alleged railroad accident (R. 343, 344, 407, 408, Ex. 5). Plaintiff also claimed an inability to sleep at the time of trial because of the condition of his back (R. 216), but hospital records showed that at various times during the year following his alleged railroad injury plaintiff "slept well," "slept good," or "slept comfortably" (Ex. 5). It is also significant that plaintiff continued working after his alleged railroad accident and worked more regularly and earned more money than at any time before his alleged railroad accident (R. 40, 87, Ex. A). Following the bridge accident, plaintiff did not and apparently could not work, and according to his own testimony was under the constant care of Dr. Nelson (R. 517-520).

The Stricken Testimony Was Not Cumulative: Its Exclusion Withdrew the Issue From the Jury.

It is apparently respondent's position that even though it may have been error to strike the testimony of witnesses Young, Kemp and Lippincott, there was no prejudice to defendant because the stricken evidence was merely cumulative. *Here, again, respondent has not only failed to examine the evidence in the light most favorable to defendant but refuses to give any weight whatsoever to the testimony favorable to defendant.*

The record shows plaintiff's own unsupported, interested testimony as to the happening and results of the Black Hawk Bridge accident is diametrically opposed to the stricken testimony of the three witnesses for defendant, to-wit, City Police Officer Young, Deputy Sheriff Lippincott and Railroad Police Officer Kemp. Without the testimony of defendant's witnesses, plaintiff's version of the manner in which the accident occurred does not make an issue of fact. It is this dispute in the testimony which gives rise to the jury question as to what happened on the Black Hawk Bridge and also as to whether plaintiff received substantial injuries in said accident. According to plaintiff's version, the bridge was covered with ice. He started to skid, slowed to one or two miles per hour and leisurely stepped from the automobile before it toppled through the railing and fell five or six feet to the ground below the bridge. Plaintiff claims to have sustained only a head scratch in getting out of the car (R. 107-108). Accepting plaintiff's miraculous version alone creates no issue of fact. From this testimony alone the jury could, of course, not infer back injury or aggravation in the bridge accident.

The stricken testimony of defendant's witnesses on the other hand shows an entirely different occurrence—a dry bridge (R. 469, 474), a car speeding out of control with such

terrific force as to sheer off ten feet of heavy guard rail on the left side of the bridge, and then to still have sufficient momentum to cross the bridge, crash into the guard rail on the right-hand side and destroy 70 additional feet of railing before plummeting ten or twelve feet to the ground (R. 465, 467, 474, 475).

Attention is again invited to the pictures of the bridge, Defendant's Exhibits "E," "F" and "G" in the Appendix, *infra.*

The stricken testimony further described the position of plaintiff's demolished automobile after it had gone over the bridge and overturned (R. 474-476), as well as plaintiff's physical appearance following the accident, his soiled, mud and vomit-stained clothing (R. 460-462) (the mud being indicative that plaintiff fell with the car and the vomit indicating the possibility of serious concussion and internal injuries), and his own admission to Deputy Sheriff Lippincott that he was not able to obey an arrest warrant on the following day (R. 477-480).

Without the testimony stricken by the trial court, there were no facts left in the case available to defendant to argue this major issue to the jury. The exclusion of the evidence deprived defendant of the right to a jury trial on this important and controlling issue of the case.

CONCLUSION

It is respectfully submitted that respondent has wholly failed to meet and answer the question presented herein.

Respondent has paid lip service to the numerous decisions of this Court which hold that *disputed questions of fact are for the exclusive determination of the jury rather than the Court,* but he seeks to avoid their application to *defendants* and particularly to this "special case."

On the one hand respondent has implied that there is not

a sufficient evidentiary basis to create an issue of fact, but on the other hand respondent's 38-page brief is an argument of these facts and the merits of the evidence favorable to his theory that the back injury found by Dr. Bratrud at the time of trial was not caused or contributed to by the bridge accident. Respondent's Brief has the flavor of a jury argument and should be recognized as such.

The point overlooked by respondent as well as the lower court is that this is a disputed question of fact, and as such it is for the sole determination of the jury and not one for the trial court. Therefore, it is again respectfully suggested that the stricken testimony of Young, Lippincott and Kemp made at least a clear question of fact as to whether the Black Hawk accident was a serious one as testified to by them or merely a trivial one as described by plaintiff alone. We, therefore, again respectfully request the Court to grant the Petition for Writ of Certiorari herein.

Respectfully submitted,

.....

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Of Counsel:

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S. W. RIDER, JR.,
G. F. BENNETT,
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Ottumwa Iowa
3-9-30

H J Berry
Claim Agt

Dear Sir

I have recovered from my recent injury sufficiently to return to work as a locomotive engineer on the KC division at Ottumwa Iowa on the 25th day of February. I would appreciate settlement at your earliest convenience.

Respectfully Yours
Wm J Gladson
RR #4
Ottumwa, Iowa

DEFENDENTS EXHIBIT 6

18981 33

35984

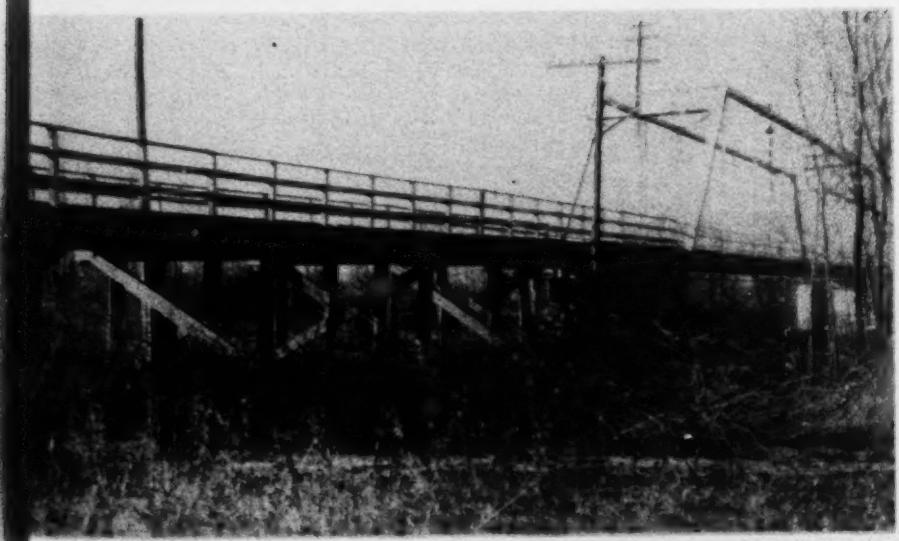
Taken at Ottumwa, Iowa, Jan. 15th, 1952, about 10 A. M.

Looking West

Looking Northwest

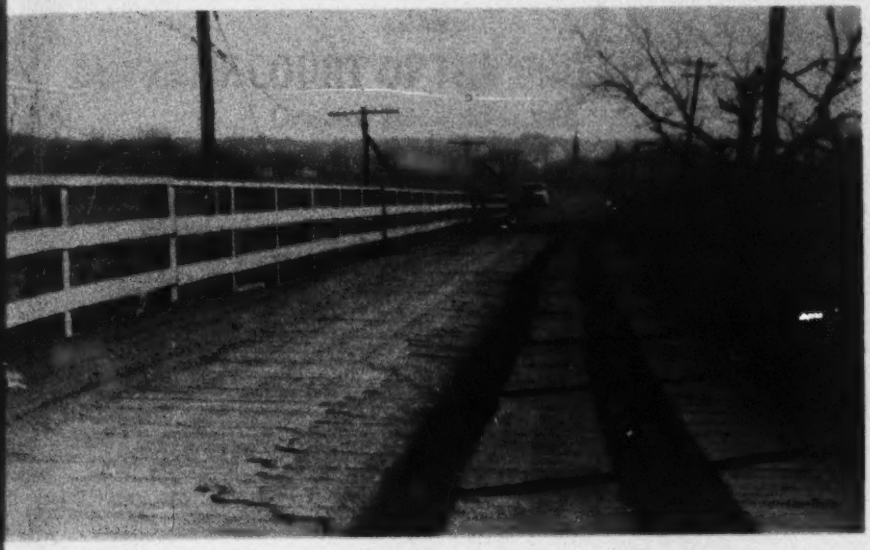
DEFENDENTS EXHIBIT "E"

Looking Southwest



Looking Southwest

DEFENDENTS EXHIBIT "F"



Looking East

Looking Southwest

DEFENDENTS EXHIBIT "G"